No. 702

In the Supreme Court of the United States

OCTOBER TERM, 1938

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY, PETITIONER

v.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals of the State of Maryland (R. 19–23) is not yet officially reported. The memorandum opinion of the Baltimore City Court (R. 9–17) is not reported.

JURISDICTION

The order of the Court of Appeals of the State of Maryland was entered on December 1, 1938 (R. 18). The petition for a writ of certiorari was filed February 25, 1939 (R. 24). The jurisdiction of

this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a mortgage executed to the Home Owners' Loan Corporation, an instrumentality of the Federal Government, is subject to state documentary and recording taxes.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 13–15.

STATEMENT

This action was instituted in the Baltimore City Court by the respondent by petition for a writ of mandamus (R. 1–5) to compel the petitioner, as Clerk of the Superior Court of Baltimore City, to receive and record a mortgage executed to the respondent upon payment of the usual recording fee, but without payment of the recording tax and affixation of the documentary stamps prescribed by the laws of the State of Maryland. The petitioner demurred to the respondent's petition for a writ of mandamus (R. 8). The Baltimore City Court overruled the petitioner's demurrer "with leave to answer within 30 days." (R. 9.) The petitioner elected to stand upon his demurrer and filed no answer to the respondent's petition for a writ of mandamus. (R. 17.)

The material facts as alleged in the petition for a writ of manudamus (R. 1–5) and admitted by the demurrer (R. 8) are as follows:

The Home Owners' Loan Corporation of Washington, D. C., the respondent, is a corporate instrumentality of the United States of America, organized, existing and operating pursuant to Section 4 of the Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, as amended (U. S. C., Title 12, Sec. 1463), whose entire capital stock is owned by the United States and as such has been operating in the several States and in the State of Maryland. (R. 1.)

In the course of the respondent's operations, Martin J. Burns and Mary Burns, his wife, of Baltimore, Maryland, conveyed to it by the execution and delivery of a mortgage dated the 11th day of March 1938 (R. 1, 5–8), a leasehold estate and term of ninety-nine years from June 10, 1893, renewable from time to time forever and subject to the payment of an annual ground rent of $42.25 in and to the dwelling property in Baltimore City, Maryland, known as No. 435 East 27th Street, to secure the repayment of an advance made by the respondent to the mortgagors of $111. This advance was made for the sole purpose of defraying the cost of repairs and reconditioning to the property conveyed which were necessary to preserve the property as security for an original loan made to the mortgagors by the respondent on July 11, 1934. (R. 2).

In order to preserve and protect the respondent's lien and to enjoy the full benefits of the mortgage, it is a legal necessity under the laws of Maryland that the mortgage in question be recorded among the land records of the City of Baltimore as required and directed by the law of Maryland. (R. 2.)

The petitioner is the duly qualified Clerk of the Superior Court of Baltimore City, and under the provisions of Article 4, Section 38 of the Constitution of Maryland, as Clerk of the Superior Court of Baltimore City, is entrusted with the land records of the City of Baltimore, and it is his duty to receive and record all deeds, mortgages, conveyances, and other papers entitled or required by law to be recorded in the land records of the City of Baltimore. (R. 2.)

On March 12, 1938, the respondent, through its agent and employee, at the office of the Clerk of the Superior Court of the City of Baltimore during the hours when that office was open for the transaction of business tendered to the petitioner, as Clerk of the Superior Court of Baltimore City, the mortgage executed and delivered to it by Martin J. Burns and Mary Burns (R. 5–8) duly executed and acknowledged, and in all respects ready and eligible for recording under the registration laws of the State of Maryland, together with a fee of $2.50, the lawful charge for recording the mortgage, and requested and demanded that the mortgage be

received and recorded among the land records of the City of Baltimore as provided by law (R. 2–3).

The petitioner, as Clerk of the Superior Court of Baltimore City, upon tender of the mortgage for recordation and the usual fee exacted for recording, refused to receive the mortgage for recordation, and refused to record the mortgage unless and until the respondent paid to him for the use of the State of Maryland, in addition to the usual fee for recording, a recording tax of fifty cents, and also unless and until State of Maryland documentary stamps amounting to twenty cents in cost were purchased, affixed to the mortgage, and cancelled. (R. 3.)

Whereupon the respondent petitioned the Baltimore City Court for a writ of mandamus to compel the petitioner, as Clerk of the Superior Court of Baltimore City, to record the mortgage in issue upon payment of the lawful and usual fee for such service, alleging in the petition (R. 3–4) that it was immune from the Maryland stamp and recording taxes demanded by the petitioner (1) by virtue of the provisions of Section 4 (c) of the Home Owners' Loan Act of 1933 as amended and (2) as an instrumentality of the United States of America engaged in the functions of the Federal Government, state taxation of which is precluded by constitutional limitation.

The petitioner demurred to the petition for writ of mandamus. The demurrer having been overruled with leave to answer, which the petitioner

elected not to do, the Baltimore City Court granted the writ of mandamus petitioned for. (R. 17–18.) The Court of Appeals of Maryland affirmed. (R. 18, 23.)

ARGUMENT

The recordation and documentary stamp taxes imposed by Sections 213 and 214 of Article 81 of the Code of General Laws of Maryland (as enacted by Chapter 11 of the Acts of the Special Session of the General Assembly of Maryland of 1937) are in no sense charges for services incident to the recording of the mortgage in question. No contention to the contrary is made by the petitioner and, as the Court of Appeals of the State of Maryland held, the decision of this Court in *Federal Land Bank* v. *Crosland*, 261 U. S. 374, is controlling here. Moreover petitioner concedes (Pet. 12) "if the decision in the *Crosland* case is still to be considered as a binding precedent in spite of the recent decisions of this Court, then the decision of the Court below was correct."

The petitioner contends that recent decisions of this Court, particularly in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Helvering* v. *Gerhardt*, 304 U. S. 405, have established principles which so qualify *Federal Land Bank* v. *Crosland* as to nullify that decision as a binding precedent here. In support of this contention it is argued (1) that the functions and activities of the Home Owners' Loan Corporation are proprietary and

nongovernmental, (2) that no burden results to the Home Owners' Loan Corporation from the imposition of the taxes, and (3) that since the taxes are uniform and nondiscriminatory they are not invalid by constitutional limitation. In substance the petitioner's argument in support of the constitutional validity of the taxes is that the doctrine of implied immunity is not only one mechanically reciprocal in application, but also that the factors and principles entering into the determination of an individual taxpayer's immunity from an income or gross receipts tax are equally applicable and decisive in the case of an instrumentality of the Federal Government which is sought to be subjected to state privilege or license taxes.

1. In the brief for the United States as *amicus curiae* in *Graves* v. *New York ex rel. O'Keefe,* No. 478, October Term, 1938, pp. 17–38, the Government has argued at large the first group of issues raised by petitioner. In that brief it is shown: (a) The doctrine of implied immunity protects equally the independence of both the State and the Federal governments within their respective spheres, but this by no means implies that there is a precise equivalence or mechanical reciprocity in the taxing powers of the two governments; the structure of the Federal Government and the supremacy clause of Article VI of the Constitution, as do the decisions of this Court, forbid such a rule. (b) The doctrine of proprietary or nonessential functions

is wholly inapplicable to the exercise by the United States of any of its delegated powers which, by definition, are governmental. There can, therefore, be no thought of applying such a test to the activities of the Home Owners' Loan Corporation. (c) If, however, such a test were to be applied, the activities of the Home Owners' Loan Corporation, undertaken in the exercise of the fiscal and the general welfare powers, are purely governmental. In the interest of brevity we incorporate by reference the argument made in the *O'Keefe* brief in support of these propositions.

2. Petitioner, in the second place, argues that the tax should be sustained because its imposition results in no burden on the Home Owners' Loan Corporation. In this argument he overlooks the basic consideration in the recent cases upon which he chiefly relies. *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *Helvering* v. *Gerhardt*, 304 U. S. 405. In each of these cases the taxpayers whose incomes were taxed were private corporations and individuals; any economic burden resulting to the governments could only have been transmitted to them by or through the private taxpayer. Accordingly, the Court ruled, as it said in the *Gerhardt* case, that even if the tax were to be considered an economic burden upon the Government, its impact was

merely conjectural. We do not have that situation here.

The Home Owners' Loan Corporation is an instrumentality of the United States. Its stock is wholly owned by the United States, and its functions are undertaken purely on behalf of the Government. "This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account." *Clallam County* v. *United States*, 263 U. S. 341, 345. It is thus a part of the United States Government and, unless waived by Congress, expressly or by implication, has every constitutional immunity which surrounds the operations of the ordinary departments of the Government.[1] There is here no waiver of the immunity of the Home Owners' Loan Corporation from a tax imposed by a State upon the recordation of its mortgages. Indeed, Section 4 (c) of the Home Owners' Loan Act of 1933, *infra*, declares that "the Corporation, including its franchise, its capital, reserves and surplus, and its loans and income" shall be exempt from all taxation. The tax upon the recordation of the mortgage seems plainly to contravene the exemption given the loans of the Corporation, since it is a tax imposed upon the means by which those loans are secured.

[1] See *McCulloch* v. *Maryland*, 4 Wheat. 316, 421–422; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 208; *Federal Land Bank* v. *Crosland*, *supra*.

The tax at bar is imposed upon instruments offered for recordation. Plainly the Home Owners' Loan Corporation, rather than the mortgagor, will offer the mortgage for record and will be required in the first instance to pay the tax. The tax is thus one which is directed at the Government itself. It is immaterial that the Corporation, through increasing its charges to the mortgagor, might at once or when the loan is repaid reimburse itself from a private individual. The very considerations which in the recent decisions of this Court have led it to the conclusion that taxes upon a private person were not to be invalidated merely because the taxpayer dealt with the Government serve to show that a tax upon the Government itself is not to be sustained merely because it deals with a private person in transactions related to that upon which the tax is imposed. Moreover, even if the Home Owners' Loan Corporation were assured of complete reimbursement by the mortgagor, the State is powerless to add to the federal functions of the Corporation the duty of collecting Maryland privilege taxes.

3. Petitioner emphasizes that the tax is nondiscriminatory, and rests upon the Home Owners' Loan Corporation in common with all other mortgagees who offer instruments for recordation. This factor might be critical, if not determinative

of the issues, were the tax directed at a private person rather than the Government itself. But, apart from the qualification applicable in the case of proprietary or nonessential state activities, the implications of the Constitution have consistently been construed to forbid *any* tax imposed by the State or Federal government upon the other government itself.

A century and a half of constitutional practice, reflected in many decisions of this Court, forbid subjection of one government to the tax machinery of another. In this immunity of the government itself there arises no confusion or unfair tax discrimination comparable to that which follows any grant of immunity from a nondiscriminatory tax to a private person. For this reason, when the immunity is one of the government itself and does not carry with it the confusion and unfairness which follows a grant of tax exemption to private persons, it seems that there is no occasion to reexamine settled principles.

The authority of *Federal Land Bank* v. *Crosland, supra,* has not been qualified or limited by later decisions of the Court. Its principle has been applied not only by the Court of Appeals of Maryland, but in other jurisdictions as well. See *Federal Land Bank* v. *Hubard,* 163 Va. 860; *Home Owners Loan Corp.* v. *Anderson,* 145 Kans. 209.

CONCLUSION

Unless the court wishes to reexamine *Federal Land Bank* v. *Crosland, supra,* the petition should be denied.

Respectfully submitted.

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APPENDIX

Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128:

SEC. 4. (a) The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the board of directors of the Corporation and shall serve as such directors without additional compensation.

* * * * *

(c) * * * The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation

to the same extent, according to its value, as other real property is taxed. * * * (U. S. C., Title 12, Sec. 1463.)

Laws of Maryland, 1937, Special Session, c. 11:

SEC. 4. *And be it further enacted,* That three new sections be and they are hereby added to Article 81 of the Annotated Code of Maryland (1935 Supplement), to be under the sub-title "Tax on the Recordation of Instruments in Writing", said new sections to be known as Sections 213 and 214, to follow immediately after Section 212 of said Article, and to read as follows:.

213. A tax is hereby imposed upon every instrument of writing recorded or offered for record with the Clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing so recorded or offered for record, which create liens or incumbrances on real or personal property, or convey title to real or personal property; provided, however, that said tax shall not apply to assignments of mortgages, purchase money mortgages, absolute or partial releases, or orders of satisfaction.

The tax hereby imposed shall be at the rate of 10c for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the property transferred, in the case of instruments conveying title, and at the rate of 10c for each $100, or frac-

tional part thereof, of the principal amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt.

In addition to the tax hereby imposed, the Clerks shall collect a charge of 50c for each such instrument recorded or offered for record.

214. No such instrument shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. The Comptroller shall supply to the Clerks of the Circuit Courts of the respective Counties or the Clerk of the Superior Court of Baltimore City, stamps to evidence the payment of said tax, for sale to persons offering such instruments for record, under such rules and regulations as the Comptroller may prescribe. The proceeds from the sale of said stamps, together with the recordation charges herein provided, shall be accounted for and paid over to the Comptroller who shall deposit the same in the "State Fund for Aid to the Needy" to be disbursed therefrom for the purposes and in the manner prescribed by law.

It shall be unlawful for any person to record any written instrument referred to in this sub-title without having provided for the payment of the tax and recordation charge as herein provided, and it shall be unlawful for any person to misrepresent the amount of the actual consideration in any such transaction. Any person violating the provisions of this sub-title shall be subject to a fine of not more than $500.00 or to a sentence of not more than six months in jail:

U. S. GOVERNMENT PRINTING OFFICE: 1939